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Supreme Court, U.S.
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No. 97-1511

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL W. MOORE, Director, South Carolina Department of Corrections,

PETITIONER,

versus

BEN CUMMINGS, et al.,
(Formerly Harry Plyler, et al.)

RESPONDENTS.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The respondents, two inmate classes confined at the South Carolina Department of Corrections ("inmates"), submit the following reasons why a writ of certiorari should not be issued in this matter.

Factual and Procedural Background

The underlying appeal in this case involved the constitutional interpretation of a state statute under *ex post facto* principles. The statute at issue, South Carolina Code Ann. § 24-13-720, was passed by the South Carolina Legislature in 1983, and provided:

> Unless sentenced to life imprisonment, an inmate under the jurisdiction or control of the Department of Corrections shall, within six months of the expiration of his sentence, be placed with the program provided for in § 24-13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate otherwise eligible under the provisions of this section for placement with the program under § 24-13-710 may be so placed unless he has maintained a clear disciplinary record for at least six months prior to eligibility for placement with the program.

S. C. Code Ann. § 24-13-720 (Law. Co-op. 1989)). The *program* referred to in § 24-13-720 releases inmates from institutional custody and places them under supervision in the community. The program is "virtually indistinguishable from parole." *Plyler v. Moore*, 129 F.3d 728, 733 (4th Cir. 1998).

In 1993, the South Carolina Legislature amended § 24-13-720 to provide that an inmate "*who has not been convicted of a violent crime ... may,* within six months of the expiration of his sentence, be placed in the program...." S.C. Code Ann. § 24-13-720 (Law. Co-op. Supp. 1993)) (emphasis added). The amendment maintained the requirement of a

clean disciplinary record and added the following provision:

> No inmate otherwise eligible under the provisions of Section 24-13-720 for placement with the program may be so placed unless he has qualified under the selection criteria and process authorized by the provisions of Section 24-13-710.

Id.

Later that year, the Supreme Court of South Carolina heard argument by these parties about the meaning of the statutory language. The State argued on appeal that the 1993 amendment to § 24-13-720 was a clarification of the original statute. The Supreme Court of South Carolina disagreed, holding that the eligibility criteria of -710 did not apply to inmates seeking participation in the program under -720 as it existed prior to the 1993 amendment. *Plyler v. Evatt (II)*, 438 S.E.2d 244, 245 (S.C. 1993)). In a footnote to the opinion, the state court indicated that the application of the 1993 amendments to § 24-13-720 to inmates who were eligible for release under the former version did not violate *ex post facto* principles. *Plyler v. Evatt (II)*, 438 S.E.2d at 245 n. 1.

Thereafter the inmates filed a habeas corpus and § 1983 action in federal district court seeking declaratory and injunctive relief. The inmates argued that application of the 1993 amendment to prisoners who were otherwise qualified under the original version of the § 24-13-720 program violated the *Ex Post Facto* Clause. The action was brought by two subclasses of inmates. One subclass was composed of inmates serving sentences for crimes that occurred between June of 1983 and June of 1993. This subclass sought review of their claims under title 28 U.S.C. § 2254. These inmates asserted that they had complied with the exhaustion requirements of 28 U.S.C. § 2254 because the decision of the South

Carolina Supreme Court in *Plyler v. Evatt (II)*, made any further recourse to the State's courts on the *ex post facto* issue futile. The second subclass of inmates had committed crimes prior to June of 1993 but were unidentified at the time of the filing of the case. These individuals had either not been tried and sentenced or had not reached the point in their sentences when it could be determined whether they would be eligible for release under the program at issue. These individuals sought declaratory relief pursuant to 42 U.S.C. § 1983.

The State filed an answer to the federal complaint denying that the retroactive application of the 1993 amendment violated *ex post facto* concerns. The State did not contest the authority of the federal district court to hear the case and admitted the inmates' assertion concerning the exhaustion requirements of title 28 U.S.C. § 2254. Subsequently, the district court granted the relief sought by the inmates finding that application of the 1993 amendment violated *ex post facto* principles. (*App. C to Pet. for Cert.*, at 18a-25a). The Fourth Circuit affirmed the district court's *ex post facto* analysis. *Plyler v. Moore*, 129 F.3d 728 (4th Cir. 1998). That court rejected the State's argument that the circuit court had no federal jurisdiction to hear the issue under the *Rooker-Feldman*[1] doctrine. *Id.* at 733.

Reasons to Deny the Writ

I. Case or Controversy

The State's argument that there is no jurisdiction is now resolved. The State

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[1]*See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923); *District of Columbia Ct. App. v. Feldman*, 460 U.S.462, 482-86 (1983).

never alleged that the classes approved by the district court were not comprised of individuals who were eligible for the release in this matter. Pursuant to an order of the circuit court, (*App. A to Pet. for Cert.*, at 1a), the district court approved Ben Cummings, an inmate who is potentially eligible for the release program, as the named class representative.

II. Federalism Concerns

The primary constitutional issue in this matter, that *ex post facto* principles mandate the release of the inmates from confinement, is not raised for review. Instead the State raises procedural issues seeking to foreclose the inmate class from pursuing federal habeas relief because they did not seek certiorari review before turning to the federal courts. The State no longer contests the constitutionality of the inmates' confinement but instead, attempts to prevent their release from unquestionably unconstitutional confinement by raising an argument that runs contrary to the very principles underlying habeas corpus and the exhaustion requirement. Simply put, the issue raised by the State in its stay motion is directly contrary to this Court's ruling in *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The State does not contest that the § 24-13-720 release program is, in all essential respects, identical to release on parole. (*Pet. for Cert.*, at 11-13). Further, the State acknowledges that in *Preiser* this Court specifically addressed the issue of whether release on parole is appropriately sought through habeas relief with its attendant exhaustion requirement. The State asserts, however, that "*Preiser*... involved only the individualized *ad hoc* complaints of a few inmates, and no contrary decision on a policy matter by the

state's highest court. The result reached in *Preiser* served to advance federalism by requiring exhaustion of state remedies." (*Pet. for Cert.*, at 14). How the *Preiser* inmates' "*ad hoc* complaints" are of a qualitatively different character than the complaints raised by the *Plyler* inmates is difficult to fathom. The circuit court firmly and correctly rejected this argument. (*Pet. for Cert.*, at 11a-12a) (noting the similarities of the inmates' claims in *Plyler* and *Preiser* claims and discussing this Court's recent decision in *Lynce v. Mathis*, 117 S.Ct. 891, 893 & n. 4 (1997)).

The State argues that habeas corpus relief is an extraordinary remedy. The inmates do not contest this well established principle. It is an extraordinary remedy because our system of justice holds paramount the principle that citizens are to be released forthwith from unconstitutional confinement. It is this very principle that the inmates rely upon to press their claims. Their continued confinement violates a basic right guaranteed them by our Constitution. They have completed the sentences imposed upon them by our judicial system and are entitled to release from confinement. They have sought this release from the state court and have been denied. Their remaining avenue for relief from the confinement is habeas corpus. Even if the inmates had sought certiorari review of the South Carolina Supreme Court's decision and this Court had denied review, the inmates, at least individually, would have retained the right to challenge their continued confinement. Surely our judicial system has not reached the point that, in an effort to foreclose frivolous claims, it denies relief for unquestionably unconstitutional confinement. The simple fact is that the inmates followed long-standing principles of federalism by exhausting their state remedies

before filing their action in the federal court system.

III. Prudential or Discretionary Reasons

This is not a case involving procedural error. The inmates are entitled to release because they have completed their imposed sentences of incarceration. In fact, it is not contested that their continued confinement in prison violates our Constitution. Undaunted by these truths, the State argues that it is fortuity that the inmates are being released from custody. This argument is based, in part, upon the State's position that it was unlikely that this Court would have granted certiorari review of the South Carolina Supreme Court's footnote rejection of the *ex post facto* issue. This argument misses the point. The issue is whether the inmates' confinement is wrong, not when it is determined. The inmates who were denied relief after the Fifth Circuit's decision in *Hock v. Singletary*, 41 F.3d 1470 (5th Cir. 1995), are entitled that relief after this Court's decision in *Lynce*. A declaratory ruling that is contrary to this Court's interpretation of the Constitution is certainly subject to modification. An inmate wrongly denied relief is not forever barred from correcting that error when the error goes to the fact of their confinement.

For this reason, the *Rooker-Feldman* bar does not apply to habeas corpus actions. That is and has been the law, and the State has raised no valid reason for this Court to now revisit the issue of whether federal review is available for properly-exhausted, constitutional habeas corpus claims.

The State also raises an argument about a split in the circuits on this point. Specifically, the State argues that the Third Circuit has found that attacks on eligibility for

furlough and work-release programs are properly brought under title 42 U.S.C. § 1983 rather than habeas corpus. (*Pet. for Cert.*, at 14-15). The cases cited by the State simply do not raise the issue involved in this case. The inmates in this case do not challenge the conditions of their confinement or some *temporary* placement in an alternative program. *See Wright v. Cuyler*, 624 F.2d 455, 458 (3rd Cir. 1980) (furloughs at issue were limited to seven days duration, and court differentiated between them and *Preiser* release on parole). Unlike the cases cited by the State, the inmates' challenge goes directly to the issue of whether they are entitled to be released from confinement.

II. Conclusion

For the foregoing reasons the inmates request that this Honorable Court deny the petition for a writ of certiorari in this matter.

Respectfully submitted, this the 8th day of May, 1998.

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MICHAEL W. MOORE, Director,
South Carolina Department of Corrections,

PETITIONER,

versus

BEN CUMMINGS, SCDC #181173, et al.,

RESPONDENTS.

CERTIFICATE OF SERVICE BY MAIL

I do hereby certify that I have served upon the attorneys for the Petitioner the Respondents' Brief in Opposition to Petition for Writ of Certiorari in this action by depositing one copy of the Brief to each in the United States Mail, first class, postage prepaid, addressed as follows:

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I do further certify that I am a member of the United States Supreme Court Bar having been admitted on November 26, 1984, and that all parties have been served in this matter.

Signed this the 8th day of ~~April~~ May, 1998, in Columbia, South Carolina.

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